No. 22450

In the

United States Court of Appeals

For the Ninth Circuit

LES SCHWIMLEY MOTORS, INC.,
Appellant,

vs.

CHRYSLER CORPORATION AND CHRYSLER MOTORS CORPORATION,
Appellees.

Appellees' Brief

On Appeal from the United States District Court for the District of Nevada

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Appellees' Brief

On Appeal from the United States District Court
for the District of Nevada

I.
STATEMENT OF THE CASE

A. The proceedings in the United States District Court for the Eastern District of California

The complaint in this action was filed in the United States District Court for the Eastern District of California on November 4, 1966. It alleged that appellant sold De Soto and Plymouth automobiles pursuant to an agreement with appellee Chrysler Motors Corporation dated May 1, 1958 (Comp., 1st C/A, para. VIII, C.T. 3*), and that on November 18, 1960 appellees Chrysler Motors Corporation and Chrysler Corporation discontinued production of De Sotos. (Comp., 1st C/A, paras. XVII, XVIII, C.T. 4-5, O.Br. 2†)

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*The Clerk's transcript is referred to in this brief as "C.T.....".
†Appellant's Opening Brief is referred to as "O.Br.....".

It claimed that that discontinuance was wrongful upon several theories, which it set forth in six causes of action.

Appellees moved to dismiss upon the ground that each of those causes of action was time-barred by the relevant California statutes of limitation. (C.T.13) Those statutes were applicable because the Eastern District Court sat in California, California statutes of limitation are applicable to causes of action filed there wherever they may have arisen, and that rule is binding on a federal court sitting in California whose jurisdiction is based on diversity of citizenship. *State of Ohio Ex. Rel. Squire v. Porter,* 21 C.2d 45, 47, 129 P.2d 691, *cert. den.*, 318 U.S. 757 (1942); *Sullivan v. Shannon,* 25 C.A.2d 422, 425, 77 P.2d 498 (1938); 1 Witkin, Procedure, p. 507; *Zellmer v. Acme Brewing Co.,* 184 F.2d 940 (9th Cir. 1950); *Klaxon Co. v. Stentor Co.,* 313 U.S. 487 (1941). The Eastern District Court's jurisdiction was based upon diversity. (O.Br. 1*)

The first cause of action was for breach of a written contract, and the longest applicable California statute, C.C.P. §337 (1), applied to it. Since the alleged breach occurred on November 18, 1960 (C.T. 4-5), and since the complaint was filed on November 4, 1966, almost six years later, it was plainly time-barred. So were the other five causes of action, to which shorter statutes of limitation applied. (C.T. 16-17)

Appellant conceded that that was true (C.T. 29, lines 21-25, p. 34, lines 15-19), and still does. (O.Br. 2, lines 22-25) Its "answer" (O.Br. 2, line 11) was to move to change venue, under 28 U.S.C.A. §§ 1404(a) and 1406(a), to the United States District Court sitting in Nevada. (C.T. 21)

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*Appellant's sixth cause of action was based on the Automobile Dealer's Day in Court Act, 15 U.S.C.A. §§ 1221-1225. It was barred by a federal statute of limitations, 15 U.S.C.A. § 1223, and is no longer in the case. See p. 3, below.

The Nevada statute of limitations for breach of written contracts is six years. (Nev. Rev. Stat. §11.190(1)(a))* The complaint was filed about fourteen days before that six-year statute had run. (O.Br. 2, lines 8-10) Appellant said that the Nevada statute would be applicable were the case transferred to the United States District Court sitting in Nevada, and that therefore in that Court its first cause of action would be good by fourteen days. (C.T. 29, 34) Appellant also conceded then, and still does, that the other five of its six causes of action are barred under both California and Nevada law, and they are out of the case. (O.Br. 3, lines 7-11)

Appellant's motion to change venue was filed on February 23, 1967. Appellees opposed the motion upon the ground that Nevada was not the more convenient forum. They also opposed it, and supported their motion to dismiss, on two other grounds (C.T. 59-68): First, that one does not get a change of law along with a change of venue, and that accordingly the same California statute of limitations which barred appellant's sole remaining first cause of action in California would bar it in Nevada after transfer. Second, that appellant California corporation had no capacity to bring the action, much less to change its venue, because its corporate powers had been suspended since 1965 (C.T. 56) by reason of its failure to pay its California franchise taxes since then. Calif. Rev. & Tax Code § 23302; 2 Witkin, California Procedure, p. 1013; *Boyle v. Lakeview Creamery Co.*, 9 C.2d 16, 68 P.2d 968 (1937).

Oral argument upon appellees' motion to dismiss and upon appellant's motion to change venue was heard on April 24, 1967.(C.T. 73, lines 22-23) Just before that date appellant

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*With the exception of those for the recovery of real property or which are further limited by the Commercial Code.

paid its back taxes, and on April 21, 1967 its corporate powers were revived. (C.T. 72) By then, however, the Nevada statute itself had long since run. Since the filing of an action by a California corporation which lacks the capacity to bring it does not toll the statute (pp. 5-6, below), appellees argued that the action was time-barred even under the Nevada statute itself, and that accordingly the court should grant their motion to dismiss even if it considered that Nevada law would apply after transfer.

The Eastern District Court granted appellant's motion to change venue and transferred the action to the Nevada District Court. Its opinion, as appellant puts it, "expressed its belief that the law of the transferee forum should be applied including the Nevada six-year statute of limitations. . . ." (O.Br 3, lines 2-5) It did not rule upon appellees' motion to dismiss. (C.T. 79-84; O.Br. 3, lines 13-15)

B. The proceedings in the Nevada District Court

The Nevada District Court considered it "implicit in the transfer order" that the Eastern District Court had intended the Nevada six-year statute to apply to appellant's first cause of action after transfer, it accepted that implication as "the law of the case," and therefore applied the six-year statute to it. (C.T. 99) However, it granted appellees' motion to dismiss. (C.T. 98-100) This is the reason:

Appellant is a California corporation. At the time it filed this action it lacked the capacity to bring it under California law. (p. 3, above) By the time it paid its taxes and "revived" its capacity, the Nevada statute had run. The fact that the action was filed before the statute had run makes no difference, because (a) the filing of an action

by a Californa corporation which lacks capacity to maintain it does not toll the statute, and (b) a revivor has no retroactive effect where the statute has run before it is obtained. *Cleveland v. Gore Bros., Inc.,* 14 C.A.2d 681, 58 P.2d 931 (1936); 3 Witkin, Summary, p. 2402. See also, *Ransome-Crummey Co. v. Superior Court,* 188 Cal. 393, 398, 205 Pac. 446 (1922); *Old Fashion Farms v. Hamrick,* 253 A.C.A. 273, 275, 61 Cal.Rep. 254 (1967).

In *Cleveland,* for example, plaintiff corporation's complaint was filed before the statute had run, but it lacked capacity to file it for the same reason appellant in this case did. Subsequently the statute ran. Defendant pleaded limitations. Thereafter plaintiff obtained a revivor. Judgment for defendant was affirmed on this ground:

> " 'That the revivor and restoration of the said corporate rights, privileges and powers of Dome Billiard and Bowling Company, a Corporation, occurred on the 10th day of May, 1934, and did not have retroactive effect in respect to the commencement and prosecution of said action. . . .' "*

Those California capacity rules, the Nevada Court held, were binding on a Federal District Court sitting in Nevada, or anywhere else, because under common law conflicts of law rules, and under Federal Rule 17(b), "the capacity of a corporation to sue . . . shall be determined by the law under which it was organized." (F.R.C.P. 17(b); C.T. 100)

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*The reason for the rule is that "it would tend to deprive the statute of its force and encourage a corporation in default to postpone payment of its taxes indefinitely if it were held that by subsequent payment of the delinquent taxes all the benefits of the attempted acts denied to the corporation could be secured." *Ransome-Crummey Co. v. Superior Court,* above, at 398. *Old Fashion Farms v. Hamrick,* above, at 275.

C. The issues on this appeal

1. The first issue

Appellant concedes (1) that all six of the causes of action alleged in its complaint were barred in the Eastern District of California by the California statutes of limitation which, it concedes, were applicable there (p. 2, above); (2) that the last five of the six are barred whether Nevada or California statutes are applicable to them (p. 3, above); and (3) that the remaining one, the first, is barred even in Nevada, and even if the Nevada statute of limitations is applicable to it, by the California rule that the filing of an action by a California corporation lacking capacity to bring it is a nullity and does not toll the statute, and by Federal Rule 17(b), which makes that California rule applicable in every Federal District Court, including that sitting in Nevada. (O.Br. 4, lines 19-25; 12, lines 22-25)

Appellant's argument is that this Court should simply "disregard" Federal Rule 17(b), and that the District Court should have too (O.Br. 4, lines 19-20); "[i]t is," appellant says, "from the Nevada Court's wooden application of Rule 17(b) which determines that plaintiff's capacity to sue is governed by the law of California that plaintiff has taken this appeal." (O.Br. 3-4)

The first issue, therefore, is whether the District Court and this Court should simply disregard Rule 17(b). The answer to that is, of course, no. (Argument, Part A, pp. 7-15 below)

2. The second issue

The Nevada District Court felt itself bound to follow the "implication" of the transfer order that the Nevada statute of limitations applied to the first cause of action after transfer. (p. 4, above) The second issue is whether

that statute or the California statute should have been applied after transfer. The answer is that the same California statute which barred this action in California before transfer barred it in Nevada afterwards, because one does not get a change of law along with a change of venue. (ARGUMENT, PART B, pp. 16-20, below) That issue need not be reached, however, unless the court finds the answer to the first issue to be yes.*

II.
ARGUMENT

A. FIRST ISSUE: whether Rule 17(b) should be disregarded

Appellant's contention that Rule 17(b) should simply be disregarded is based on two fundamental premises. The first is that the Nevada law is contrary to Rule 17(b) (Part 1, below), and the second is that a federal court has power to disregard that Rule, even if it were contrary to some Nevada law. (Part 2, below) Both those premises are false, and appellant's contention is therefore literally baseless. Appellant's contention also assumes the proposition that enlightened modern conflicts law supports it, which, besides being irrelevant since the contention is baseless anyway (Parts 1 and 2), is entirely wrong. (Part 3, below)

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*Appellant says that the Nevada District Court ruled that the Nevada statute applied after transfer, and seems to argue that therefore the issue is closed on appeal. (O.Br. 4) That is certainly not the law. "A successful party in the District Court may sustain its judgment on any ground that finds support in the record." *Jaffke v. Dunham*, 352 U.S. 280, 281 (1957); *Laughlin v. Eicher*, 145 F.2d 700, 703 (D.C. Cir. 1944), *cert. den.* 325 U.S. 866 (1945); *Commissioner of Internal Revenue v. Stimson Mill Co.*, 137 F.2d 286, 288 (9th Cir. 1943). "When the decision below is correct it must be affirmed by the appellate court though the lower tribunal * * * [may have given] a wrong reason for its actions." *Riley Co. v. Commissioner*, 311 U.S. 55, 59 (1940); *Kithcart v. Metropolitan Life Ins. Co.*, 150 F.2d 997, 1000-1001 (8th Cir. 1945), *cert. den.* 326 U.S. 777 (1945).

1. Rule 17(b) is the same as the Nevada Rule

Rule 17(b) provides that:

> "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized."*

Appellant's argument that the Rule should be disregarded is based upon the premise that Nevada law is contrary to it, and that under Nevada law the capacity of a foreign corporation to sue is to be determined by Nevada law. (O.Br. 4-6; 7, lines 12-14; 12, lines 14-17) That premise is false. The Nevada rule is the same, and in fact has the same number, as Federal Rule 17(b). Appellant does not mention it, and apparently has chosen to disregard it, too. It provides:

> "The capacity of a corporation to sue or be sued shall be determined by the law under which it was organized, unless a statute of this state provides to the contrary." Nev. Rev. Stat., Vol. 2, Rules Civ. Pro., 17(b)†

There is no applicable "statute . . . to the contrary."‡

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*Rule 17(b) also contains provisions relating to the capacity of individuals, personal representatives, partnerships, and others, to sue; those provisions are not relevant to this appeal.

†The Nevada Rule was copied from the New Mexico Rule, which in turn was copied from the Federal Rule, and added "that part following the comma." (See, New Mex. Rev. Stat. Anno., § 21-1-1 (17)(b), compiler's note; Nev. Rev. Stat. Anno., 17(b), comment, which respects all of Rule 17(b), including the part relating to personal representatives, etc.)

‡The only Nevada statute "to the contrary" is Nev. Rev. Stat. § 80.210, which restricts, not expands, a foreign corporation's power to sue. It provides that a foreign corporation which has not complied with Nevada's doing business rules cannot sue in Nevada. Many states attach the same qualification to the general rule that a corporation's capacity to sue is governed by the laws of its state of incorporation. Federal Rule 17(b) itself has, by case law, the same qualification attached to it. (p. 11, below) The effect is that a foreign corporation cannot sue in Nevada or other forums having similar laws unless it *both* has capacity to sue under the laws of its state of incorporation *and* has complied with the doing business laws of the forum state. (p 11, below)

Appellant does claim to have found a statute to help it, Nevada Revised Statute § 78.585. (O.Br. 7) It provides that "all corporations . . . whose charter has (sic) been forfeited, shall nevertheless be continued as bodies corporate for the purpose of prosecuting and defending suits . . ." It is more lenient than the California rule made applicable by Rule 17(b), and it might save appellant's claim if it were applicable to it, but it is not. It appears in Chapter 78 of the Nevada Revised Statutes, which applies to corporations organized in Nevada, only, and it has nothing whatever to do with corporations organized outside Nevada, like appellant. (See Nev. Rev. Stat. § 78.015; see also Chapter 80, which is entitled "Foreign Corporations")*

2. Rule 17(b) is binding on the Nevada District Court, and on this Court, even if it were contrary to the Nevada Rule

The Federal Rules were promulgated by the Supreme Court pursuant to Act of Congress (48 Stat. 1064, now codified at 28 U.S.C.A. § 2072). Each Rule "has the force of a federal statute," and, accordingly, each must be applied by every federal court, whether or not the Rule conflicts with a law of the state in which the court sits. *Sibbach v. Wilson & Co.,* 312 U.S. 1, 13, *modified,* 312 U.S. 655 (1941); *Mississippi Pub. Corp. v. Murphree,* 326 U.S. 438 (1945). There is one exception only. A rule need not be applied if it is invalid because "not within the mandate of Congress to . . . [the Supreme] court," *Sibbach v. Wilson & Co.,* above, at 7, or because it is unconstitutional. *Hanna v. Plumer,* 380 U.S. 460, 471 (1965).

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*The question whether Nev. Rev. Stat. § 78.585 applied to appellant was presented to the Nevada District Court. The Court held that it did not. (C.T. 99-100) "This Court accords great weight to the determination as to the law of a particular state, made by a district judge sitting in that state." *State Farm Mutual Automobile Ins. Co. v. Thompson,* 372 F.2d 256, 259 (9th Cir. 1967); *Edwards v. American Home Assurance Company,* 361 F.2d 622, 626-627 (9th Cir. 1966).

Appellant does not contend that Rule 17(b) is invalid upon those or any other grounds. Of course he could not. The Rule has consistently been applied, always upheld, and its validity never doubted. (See, e.g., *R. V. McGinnis Theatres & Pay T.V. v. Video Independent Th.*, 386 F.2d 592 (10th Cir. 1967), *cert. den.*, ... U.S. .... (April 1968) (corporate capacity and revivor of it governed by law of state of incorporation); *Sedgwick v. Beasley,* 173 F.2d 918 (D.C. Cir. 1949); *Sevits v. McKiernan-Terry Corporation,* 264 F.Supp. 810 (S.D. N.Y. 1966)). Indeed, its promulgation simply continued "the law as previously settled," 18 Fletcher, *Corporations,* § 8612, p. 31; 3A Moore, *Federal Practice,* § 17.21, p. 772, and it "is merely expressive of the general law" followed all over the country. See *Sedgwick v. Beasley,* above, at 919; *Title Co. v. Wilcox Bldg. Corp.,* 302 U.S. 120, 124 (1937); *Glennan v. Lincoln Inv. Corporation,* 110 F.2d 130 (D.C. Cir. 1940) (Maryland corporation suspended by Maryland for the non-payment of taxes cannot sue in D.C. courts); *MacMillan Petroleum Corp. v. Griffin,* 99 C.A.2d 523, 528-529; 222 P.2d 69 (1950); Restatement, Conflicts of Law, § 158; 18 Fletcher, *Corporations,* § 8612, p. 31. In *Fidelity Metals Corp. v. Risley,* 77 C.A.2d 377, 381; 175 P.2d 592 (1946), for example, a California court held that a Nevada corporation whose charter had been revoked by Nevada for failure to pay fees and to file papers could not sue in California. It said:

> "It appears to be settled law that the effect of the dissolution of a corporation, or its expiration otherwise, depends upon the law of its domicile (Restatement, Conflict of Laws, pp. 228-229, § 158; 20 C.J.S., pp. 128-129, §§ 1899, 1900), and that a defunct foreign corporation has no greater capacity or higher standing to commence or maintain an action in the state of

the forum than it would have in the state of its domicile."*

3. The proposition that enlightened conflicts law supports appellant's contention is wrong

Appellant says that Nevada has "the most significant contacts with the issues of the litigation (O.Br. 4)," and that "progressive courts" (O.Br. 12) follow "the enlightened trend of the conflict of laws that the law of the forum with the most significant contacts with the litigation should be applied to govern that litigation." (O.Br. 4) According to appellant California corporation, it "was capable" of suing in Nevada when it filed this lawsuit under a Nevada law which is applicable to Nevada corporations only (p. 9, above) (O.Br. 6, lines 20-23, 7, lines 11-13), and it follows that the "progressive" will apply that Nevada capacity law to appellant. (O.Br. 4)

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*Appellant claims that one case, *Power City Communications, Inc. v. Calaveras Telephone Co.*, 280 F.Supp. 808 (E.D. Calif. 1968) did disregard Federal Rule 17(b). (O.Br. 10-11) It held that a corporation which had capacity to sue under the laws of its state of incorporation nevertheless could not sue in Federal Court in a diversity case where it had not complied with a licensing statute of the forum state (280 F.Supp. at 812); the statute provided that a corporation which had not complied with it could not sue in the forum's courts. Although the court apparently believed it was breaking new ground with respect to Rule 17(b) (see, O.Br. 11), its holding accorded with law which has been settled for nearly twenty years. See *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949); *Horwitz v. Food Town, Inc.*, 367 F.2d 584 (5th Cir. 1966) (per curiam decision following *Woods*). The rule is that a corporation which lacks capacity to sue under the laws of the state which created it cannot sue in any District Court in any other state; and that even if it does have capacity under the incorporating state's laws, it cannot sue in a District Court in another state if it cannot sue in the courts of the state by reason of its failure to comply with a valid law of the state. See 3A Moore, *Federal Practice*, § 17.01, pp. 3-4; 18 Fletcher, *Corporations*, § 8612, p. 30. In other words, Rule 17(b) creates one hurdle and *Woods* and *Calaveras* another, and a foreign corporation cannot maintain suit unless it gets over *both*.

That argument is wrong for at least six reasons:

(1) It assumes that Nevada law provides that Nevada capacity rules respecting domestic Nevada corporations also apply to corporations created under another state's laws. But Nevada law provides, just as the general law in effect throughout this country does, that a corporation's capacity to sue is governed by the laws of its state of incorporation. (pp. 8-11, above)

(2) The argument assumes that Nevada has some "policy" (O.Br. 4, lines 21-22) or "interest" (O.Br. 6-7) (which appellant does not identify) in applying its capacity rules respecting domestic Nevada corporations to California corporations.

But Nevada has expressed precisely the contrary interest. Its Supreme Court rules provide that the capacity of a corporation to sue "shall be determined by the law under which it was organized. . . ." (p. 8, above) Indeed, what possible interest might Nevada have in imposing the Nevada rule, upon which appellant relies, that a Nevada corporation in bad standing in Nevada for failure to pay Nevada taxes, can sue, upon a California corporation which is in bad standing in California for failure to pay California taxes, and which therefore under California law cannot sue? Why should Nevada want to permit a California corporation to slip across the border to file a lawsuit for the very purpose of evading the laws of the state which created it, which it has violated, and under which it has no right to file a lawsuit at all?* See, *Title Co. v. Wilcox Building Corp.*, above, at 129.

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*Appellant seems to argue that all the relevant events which gave rise to its claim occurred in Nevada. (O.Br. 6-7) It makes no difference whether or not that is true (pp. 13-14, below), but it is not. For example, the contract on which the claim is based was executed in Los Angeles, appellant's president was a California resident at the time, and all business dealings between appellant and appellees was conducted through appellee's Bay Area offices. (C.T. 43)

(3) The argument assumes that Nevada law must be applied "in all its particulars" and California law entirely "rejected," because Nevada has the greatest number of "significant contacts" with the litigation. (O.Br. 6-7, 12, lines 14-17)

But the "enlightened conflicts" cases upon which appellant relies hold that one should not simply add up all the "contacts" a piece of litigation has with each of two conflicting states, and then apply to the litigation all the law of the state with more contacts and none of the law of the state with less. In *Babcock v. Jackson,* 12 N.Y.2d 473, 191 N.E.2d 279 (1963) (O.Br. 9), for example, the New York Court of Appeals held that New York law determined whether a New York guest could sue a New York driver who, allegedly, had negligently driven a car in Ontario, but said that Ontario law determined whether the driver had in fact been negligent. The court's reason was that New York's interest was paramount with respect to the issue as to whether a New York resident guest ought to be able to sue a New York resident driver, but that Ontario's interest was paramount with respect to "regulating conduct within its borders. . . ." (*Id.,* at 284)

Accordingly, the test is not, as appellant assumes, which state has more "contacts," but rather which state has the "more compelling interest in the application of *its law to the legal issue involved.*" (Emphasis added) (191 N.E.2d at 283) Accord, *Travelers Insurance Co. v. Workmen's Comp. App. Bd.,* 68 A.C. 1, 5-7 (1967) (O.Br. 7)

The "legal issue involved" in this case concerns the capacity of a California corporation. Nevada has no interest in applying capacity rules respecting Nevada corporations to California corporations. (p. 12, above) California has a basic interest in applying its own corporate laws to a Cali-

fornia corporation its laws created, in ensuring that a California corporation performs the obligations which it undertook in consideration of California's having created it, and in ensuring that a California corporation does not exercise the powers, like the power to bring a lawsuit, which California gave it and then took away because the corporation violated the law from which the powers came. All the authorities agree that that is so. (See, pp. 9-11, above;* see also p. 5, n., above; *Title Co. v. Wilcox Bldg. Corp.*, above, at 129.

(4) The argument assumes that a court may disregard a statute or a rule, like Federal Rule 17(b), which has the force of a statute, upon the ground that some "significant contacts" analysis indicates that the rule is "not in keeping with the enlightened trend of the conflict of laws." (O.Br. 4)

But a court cannot disregard a statute upon that ground, and a "significant contacts" analysis has no place where a statute sets forth the applicable law. *Mack Trucks, Inc. v. Bendix-Westinghouse Auto. A. B. Co.*, 372 F.2d 18, 20-21 (3rd Cir. 1966), *cert. den.*, 387 U.S. 930 (1967).

(5) The argument assumes that a Federal Court may not only disregard Rule 17(b), which it cannot, but, assuming it could, that it could also fashion a "significant contacts" conflict of laws rule in a diversity case where Nevada, the

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*Appellant's contention that it "is a California corporation in name only" (O.Br. 6) is untrue. Appellant was incorporated in California in 1947 (C.T. 55), it did not transact any business in Nevada until 1958 (C.T. 57), and it forfeited its right to do business there in 1965. (C.T. 57) Its president resided in Sacramento, California when the contract on which this claim is based was executed, and he still does. (C.T. 43-44) Moreover, appellant's contention is beside the point, which is that appellant saw fit to obtain its corporate powers from California, and it does not lie in its mouth to claim that it can willy-nilly disregard the laws under which it got those powers.

jurisdiction in which it sits, has a rule exactly like 17(b) and has not indicated any intent to adopt any other rule. A Federal Court cannot do that. *Klaxon Co. v. Stentor Co.*, above, at 487 (diversity court must apply conflicts laws of state in which sits); *Hausman v. Buckley*, 299 F.2d 696, 703-704 (2nd Cir. 1962) *cert. den.*, 369 U.S. 885 (1962) (diversity court may not disregard established law and indulge in "significant contacts" analysis "to speculate about what . . . [the law] will be").*

(6) The argument assumes its own reductio ad absurdum. It says:

> "This is not a matter of forum shopping. This is a matter concerned with applying the law of the forum with the most significant contacts with the litigation. Under this theory even if the action remained in California, the California court would be required to apply laws of the State of Nevada to this controversy." (O.Br. 12)

In other words, a California court ought to disregard the California corporation law which provides that the filing of an action by a California corporation which has not paid its California taxes, and which is therefore in bad standing in California, is a nullity, and that that California court must instead apply to that California corporation the Nevada rule that the filing of an action by a Nevada corporation which has not paid its Nevada taxes is not a nullity.

Why should a California court do anything so bizarre as that?

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*Appellant says *Chenoweth v. Atchison, Topeka and Santa Fe Railroad Co.*, 229 F.Supp. 540 (D. Colo. 1964) "made an interest analysis to determine the issue of capacity." (O.Br. 8) Actually, it merely inquired as to what conflicts law was in effect in the state in which the action was brought; the Court considered a diversity court to be bound by the state rule, not free to fashion a different one. Moreover, the case concerned the question as to who was the real party in interest in a wrongful death case, it had nothing to do with capacity (although it mentioned the word), and it certainly had nothing to do with corporate capacity.

B. SECOND ISSUE: whether the same California statute of limitations which barred this action in California barred it in Nevada, too.

Appellant concedes that its claim was time-barred in the California District Court by the California statutes of limitation which were applicable to it there. Its answer in the California court was to move to change venue to Nevada, on the theory that after transfer to Nevada appellant would be entitled to the benefits of the longer Nevada statute of limitations. The California District Court transferred the case to Nevada. The Nevada court believed it "implicit in the transfer order" that the transferor court intended the Nevada statute to apply after transfer, it accepted that as the law of the case, and therefore so held. (pp. 2-4, above) That was error.* The shorter California statute which barred appellant's claim in California barred it in Nevada, too.

Appellant's motion to change venue was made pursuant to 28 U.S.C.A. § 1404(a), which provides that venue may be changed from one proper venue forum to another "for the convenience of witnesses and in the interest of justice."†

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*The error was harmless because the Nevada court reached the right result. (PART A, pp. 7-15, above) This Court need not reach that question unless it holds that the Nevada court was wrong with respect to Rule 17(b) (see pp. 6-7, above).

†Appellant's motion was also based upon 28 U.S.C.A. § 1406, which provides for dismissal or transfer where venue in the transferor forum is *improper*. Venue was proper in the California forum, 28 U.S.C.A. § 1391, and § 1406 was therefore inapplicable. See *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964).

There is some question whether a plaintiff may move to change venue at all. See, e.g., *Trader v. Pope & Talbot, Inc.*, 190 F.Supp. 282 (E.D. Pa. 1961). Some cases have permitted plaintiff to do so, but in unusual circumstances, for example, where defendant could not be served in the transferor district, *Callan v. Lillybelle, Ltd.*, 234 F.Supp. 773 (D. N.J. 1964); *Goldlawr, Inc. v. Herman*, 369 U.S. 463 (1962); or where a similar action was pending between some of the same parties in the transferee court, *Roberts Bros., Inc. v. Kurtz Bros.*, 236 F.Supp. 471 (D. N.J. 1964); or where the venue statute changed while the case was pending. *Pruess v. Udall*, 359 F.2d 615 (D.C. Cir. 1965). Since there are no such circumstances in this case, it is doubtful whether the venue statutes were even available to plaintiff. See *Leyden v. Excello Corp.*, 188 F.Supp. 396 (D. N.J. 1960).

It does not provide that one gets a change of law along with a change of venue, and one clearly does not; the law of the *transferor* forum, including its statutes of limitation, continues to apply, after transfer, in the transferee forum. See *H. L. Green Co. v. MacMahon,* 312 F.2d 650, 653 (2nd Cir. 1962), *cert. den.,* 372 U.S. 928 (1963):

> *"Although as a matter of federal policy a case may be transferred to a more convenient part of the system, whatever rights the parties have acquired under state laws should be unaffected. . . . The case should remain as it was in all respects but location. . . .*
>
> "The problem of choice of law following transfer under § 1404(a) has arisen most commonly, as it does in part in the case at bar, when a case which for some reason comes within the federal jurisdiction is governed by a state statute of limitations. *Those courts which have considered the problem appear to have been unanimous in their agreement that the statute of limitations of the transferor state should continue to apply. . . .*" (Emphasis added) (Citations omitted)

Accord, Headrick v. Atchison, T. & S. F. Ry. Co., 182 F.2d 305 (10th Cir. 1950) (leading case); *Carr v. American Universal Insurance Co.,* 341 F.2d 220 (6th Cir. 1965); *Exchange Nat. Bank of Olean v. Insurance Co. of North America,* 341 F.2d 673 (2d Cir. 1965), *cert. den.,* 382 U.S. 816 (1965); *Greve v. Gibraltar Enterprises, Inc.,* 85 F.Supp. 410 (D. N.Mex. 1949).

Appellant agreed in the trial court that the transferor's law continues to apply where defendant moves to change venue, but claimed it should not when plaintiff does, and where the statute of limitations in the transferee is longer than that in the transferor. (C.T. 33; *cf.* O.Br. 12) But appellant cannot have it both ways, and several cases have held that an action which is time-barred in the transferor

forum continues to be barred in the forum to which plaintiff moves to transfer it, although it would not be barred under the transferee's statute of limitation. *Hargrove v. Louisville & Nashville R.R. Co.,* 153 F.Supp. 681, 684 (W.D. Ky. 1957):

> "Also the clearly stated purpose of Sec. 1404(a) is to authorize a change of venue 'for the convenience of parties and witnesses, in the interest of justice.' It would not appear to be in the interest of justice to so construe Sec. 1404(a) as to permit a plaintiff, having exercised the Sec. 1391(b) right to select his forum, to change that forum with the effect of depriving the defendant of defenses available in that forum. Plaintiffs having chosen their forum are therefore bound by its three-year statute of limitations although they could have elected to file this action in Kentucky where the five-year limitation period exists."

Accord, Bolten v. General Motors Corp., 81 F.Supp. 851 (N.D. Ill. 1949), *reversed on other grounds,* 180 F.2d 379 (7th Cir. 1950), *cert. den.,* 340 U.S. 813 (1950). See also *Quinn v. Simonds Abrasive Co.,* 199 F.2d 416 (3d Cir. 1952), *cert. den.,* 345 U.S. 964 (1953); *Leyden v. Excello Corp.,* above, at 396.

There is no judicial authority the other way, and the Eastern District Court acknowledged that fact. (C.T. 82, lines 14-16) Appellant cites one case (O.Br. 5) only to support its position, *Van Dusen v. Barrack,* above, at 612. There defendant moved to change venue. Plaintiff administrator had capacity to sue in the transferor forum, and resisted the motion upon the ground that he lacked capacity to sue under the laws of the proposed transferee forum. The Supreme Court held that that ground was insufficient, be-

cause the *transferor forum's* laws continued to apply after transfer.* Therefore *Van Dusen's* holding is flatly opposed to appellant's position.

The question as to what law should be applied where plaintiff moves to transfer was not before the *Van Dusen* court, and accordingly the court did not reach it. (376 U.S. at 640) Appellant apparently considers that a ruling in its favor. (O.Br. 5) It should not. All the reasoning in *Van Dusen*, as well as its holding, is dead against appellant:

> ". . . *The legislative history of § 1404(a) certainly does not justify the rather startling conclusion that one might 'get a change of law as a bonus for a change of venue.'* Indeed, an interpretation accepting such a rule would go far to frustrate the remedial purposes of § 1404(a). If a change of law were in the offing, the parties might well regard the section primarily as a forum-shopping instrument. And, more importantly, courts would at least be reluctant to grant transfers, despite considerations of convenience, if to do so might conceivably predjudice the claim of a plaintiff who had initially selected a permissible forum. *We believe, therefore, that both the history and purposes of § 1404(a) indicate that it should be regarded as a federal judicial housekeeping measure, dealing with the placement of litigation in the federal courts and generally intended, on the basis of convenience and fairness, simply to authorize a change of courtrooms . . . .*
>
> "Although we deal here with a congressional statute apportioning the business of the federal courts, our interpretation of that statute fully accords with and is supported by the policy underlying *Erie R. Co. v. Tompkins,* 304 U.S. 64.
>
> ". . . *What Erie and the cases following it have sought was an identity or uniformity between federal and state courts;* and the fact that in most instances

*The case also concerned interpretation of a part of Rule 17(b) which is applicable to an administrator's capacity to sue and is not relevant to this case.

> this could be achieved by directing federal courts to apply the laws of the States 'in which they sit' should not obscure that, *in applying the same reasoning to § 1404 (a) the critical identity to be maintained is between the federal district court which decides the case and the courts of the State in which the action was filed.*" 376 U.S. at pp. 635-639. (Emphasis added)

The venue statutes are not intended to permit forum shopping. 376 U.S. at 636; *Roberts Bros. Inc. v. Kurtz Bros.,* 231 F.Supp. 163, 168 (D. N.J. 1964) They are merely "a federal judicial housekeeping measure." 376 U.S. at 636. Their purpose is to ensure that a case may be transferred for trial from one forum to a more convenient one *without affecting the parties' rights at all.* (pp. 17-19, above) It is directly contrary to their purpose to permit them to be used as a vehicle to change the law and therefore the parties' rights.

CONCLUSION

Appellant's claim was time-barred in California, where it was filed, by the California statutes of limitation applicable to it here. Those same California statutes barred it in Nevada, after it was transferred there. The Nevada statute of limitations itself also barred it there, and would have had it been filed in Nevada to start with, because the filing of an action by a California corporation lacking capacity to bring it is a nullity, and that rule follows California corporations wherever they go.

One ought not to get a change of law "as a bonus" for changing venue, because that would subvert the purpose of the venue rules. A corporation ought not to be permitted to acquire a capacity it has lost by failure to comply with the

laws of the state which created it through the device of filing a claim in another state, much less through the device of transferring a claim it filed in a federal court sitting in its own state to a federal court sitting somewhere else.

The Nevada District Court's judgment should be affirmed.

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Respectfully submitted,

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